Available online at www.sciencedirect.com

ScienceDirect

Procedia - Social and Behavioral Sciences 149 (2014) 174 – 179

Procedia
Social and Behavioral Sciences

LUMEN 2014

Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice

Emilian Ciongaru [a,b,*]

[a]*Ph.D, Associate researcher, Romanian Academy, Institute of Legal Research „Acad. Andrei Radulescu", Bucharest, Romania.*
[b]*Researcher, Hyperion University, Bucharest, Romania*

Abstract

It is very difficult to conceive a legal system that may not contain the principle according to which legal conventions concluded have the power of law between the contracting parties. Keeping one's word is one of the pillars of all current legal systems and of the Roman one or even others considered as more primitive. As any legal principle, it has certain limits that are equally important as the principle itself. Among these limits, the principle of binding force of the contract, pacta sunt servanda, there is one recently introduced in the Romanian legal system, namely the theory of imprevision, a legal mechanism by which they follow, above all, the restoration of contractual justice. Imprevision, which is the less visible and contradictory part of the pacta sunt servanda principle, is generated by a social-economic reality appeared following some drastic and unpredictable changes of the conditions in which a contract is to be executed with respect to the aspects envisaged by the parties upon the conclusion thereof. The theory of imprevision aims at answering the debtor's situation if any unpredictable events that bring prejudice to the balance of services should occur, balance that was considered by the contracting parties upon the conclusion of contract when the agreement was formed. As a principle, before the coming into effect of the New Civil code, the Romanian courts refused to enforce the theory of imprevision, except for some cases related to the reevaluation of rents. This principle adopted both by the law courts relied on the strict interpretation of contractual provisions and the inexistence of some express legal provisions that might allow the judge to intervene in a contract, and arguments from the practice of international commercial transactions are brought to support the enforcement of the theory of imprevision.

Selection and peer-review under responsibility of the Organizing Committee of LUMEN 2014.

Keywords: the binding force of contract; theory of imprevision; contractual justice; legal mechanisms; contractual risk;

* Corresponding author. Tel.: +4-072-298-4589; fax: +4-021-210-5070.
E-mail address: emil_ciongaru@yahoo.com

Selection and peer-review under responsibility of the Organizing Committee of LUMEN 2014.
doi:10.1016/j.sbspro.2014.08.183

1. Introduction

The principle of imprevision is enshrined in the Romanian by way of the adage *omnis conventio intellegitur rebus sic stantibus*, according to which all conventions are considered valid if the circumstances under which they were concluded remain unchanged. (Beleiu, 2003, 32-33) A convention or a contract is a legal document having a fundamental purpose, namely to civilise countries, peoples, persons, representing the basis for life in any community (Josserand, 1933, 138). Article 1270 of the new Romanian Civil Code (art. 969 of the 1864 Civil Code) has a wording identical to Article 1134 of the French Civil Code, according to which, *the conventions lawfully entered into take the place of the law for those who have made them.* It is difficult to conceive a legal system that does not contain such a principle. Keeping one's word (Supiot, 2011, 138) is one of the pillars of all current legal systems and of the Roman law one also, as well as of other systems that are deemed to be more primitive, and, just as any principle of law, it has limitations just as important as the principle in itself.

The word given by way of will exteriorisation (Djuvara, 1999, 138) under any contract is represented by the legal document development, which results in the defining thereof as manifestation of will with intent to produce legal effects - to create, amend or terminate a legal relation – and it consists in three notions (Deleanu, 2005, 249): it is a manifestation of will, this will being that of a reasonable person, as a result of such person's reflection; in order to be effective from a legal perspective, the will is to be manifest, i.e., externalised; the manifestation of will is aimed at causing legal effects (Pop, 1994, 60), with a view to creating, amending or terminating a specific legal situation. However, if between the time of contract conclusion and contract execution, unpredictable events occur that fundamentally changed the economic or other kind of circumstances existing at the time of the initial agreement between the parties, thereby rendering significantly more difficult either's party performance, the principle of the binding power of the contract is no longer applicable, and the competent body is entitled, independently from the existence of such a contractual provision, to proceed to contract redrafting according to the new circumstances and, alternatively, to terminate the contract and correspondingly eliminate the debtor's liability. (Sitaru, 1996, 77)

The role of the parties during contract execution, which derives from the solidarity relation, is to adapt the behaviour thereof with a view to meeting the interests of each of them and obtain a result as similar as possible to the one envisaged upon contract conclusion. Otherwise, the contractual solidarity allow conduct correction following the action of external elements, courts of law included. The requirements of contractual solidarity are visible when difficulties occur in the execution of the undertaken obligations. When such are specific to one of the contractual party, the other one has the obligation to be tolerant, this being aimed at preserving the initial contractual balance, and being mainly accomplished by the suspension /deferral of the performance deadline or the decrease in the extent of the debtor's debt. When the difficulties are a result of external circumstances, including economic phenomena such as monetary fluctuations, the parties have the obligation to adapt the contract. Furthermore, even when the contract is not executed, the contractual solidarity involves selecting the prerogatives available to one of the parties and implementing them as remedies for the existing situation, but not for the purposes of sanctioning he debtor. Considering this, the contractual imprevision relates, at least in theory, to the legal techniques, which are sought to become fairer, more equitable, as contractual relations set-up by way of mechanism parallel to those included by the parties in their convention, if any. The contractual imprevision was defined by the doctrine (Pop, Popa, Vidu, 2012, 534) as "the prejudice suffered by one of the contracting parties as a result of a severe imbalance in value between the parties' performance and counter-performance during the contract execution, such imbalance being caused by the economic circumstances, monetary fluctuations in particular". Therefore, imprevision relates to a severe imbalance subsequent to the conclusion of a contract providing successive execution in time or execution at different times of the obligations between the parties, such imbalance occurring between the contractual performances (Stark, 1972, 75) as a result of an event unpredicted upon contract conclusion and which results in the obligations of one of the parties becoming too onerous.

2. Imprevision in the Current Legislation

The Romanian legislation acknowledges imprevision as a general principle under the new Civil Code adopted by Law 287/2009 (published in the Official Journal no. 511 of the 24th of July 20099). Therefore, Art. 1271, provides as follows: "*(1) The parties shall be bound to execute their obligations even when such execution has become more*

onerous, either because of an increase in the execution costs or because of a decrease in the performance value. (2) However, when the contract execution has become excessively onerous due to an exceptional change in circumstances, which would render the binding of the debtor to fulfil the obligation evidently unjust, the court of law may order: a) the adaptation of the contract in order to equitably distribute between the parties the losses and benefits resulting from the change in circumstances; b) the termination of the contract at the moment and under the conditions established under it. (3) The provisions of par. (2) shall applicable only if: a) the change in circumstances occurred after the conclusion of the contract; b) the change in circumstances, as well as their extent, were not and could not have been reasonably considered by the debtor upon contract conclusion; c) the debtor did not undertake the risk of the change in circumstances and they could not have been reasonably considered to have undertaken that risk; d) the debtor tried, within a reasonable period and in good faith, to negotiate the reasonable and equitable adaptation of the contract." According to the regulation, the matter of imprevision is put forward only for the obligations deriving from onerous title contracts. This assumption is supported by the lawmaker by the notion of *counter performance* in par. (1) of Art. 1271, which excludes the obligatory relations arising from licit or illicit deeds. Furthermore, please note that the imprevision is an economic and financial matter, an effect of a change in circumstances resulting in excessive contract execution costs for one of the parties.

3. Contract adaptation clauses

The contract adaptation clauses concern the contract as a whole, not only one of the items thereof. Also unlike such, the clauses included in this category suppose a renegotiation of the contract. One of the main clauses included in this category is the *imprevision or hardship clause*, representing the contractual stipulation due to which the contract amendment becomes possible when, during the execution thereof, events occur that cannot be attributed to any of the parties and which could not have been predicted upon the obligatory legal relation establishment, but which substantially change the events considered by the parties upon contract conclusion, such events resulting into effects much too onerous for one of the parties to be equitable borne only by the concerned contracting party (Geamănu. 2007, 23). Considering these clarifications, invoking the imprevision clause become possible only when the following conditions are met:

a) the parties determined the risks allowing the use thereof. As a rule, these are general risks of any kind, such as the economic, financial, legislative, etc. On the other hand, it is necessary for these risks not to be caused by the conduct of the contracting parties, and not to result from the fault thereof (Motica. & Lupan, 2008, 76). They consist in external events that could not have been predicted upon contract conclusion.

b) the occurrence of the risks is to seriously affect the economic situation of any of the parties and significantly imbalance the contract from an economic perspective.

As a result of the unpredictable event occurrence, the concerned party will initiate the contract renegotiation and adaptation to the new circumstances. Under the provision, the parties are to regulate the solutions for the case when the contract renegotiation fails (Dumas, 2001, 371 and fool.). Therefore, they may provide for contract termination or for the possibility to contact a third party, an arbitrator or a negotiator, acknowledging the competence thereof in terms of decision on contract adaptation.

4. Court of law intervention in contracts

The effects of imprevision are regulated by Art. 1271 (2) of the new Civil Code, which provides that, once the imprevision conditions are met, "if the contract execution has become excessively onerous due to an exceptional change in circumstances, which would render the binding of the debtor to fulfil the obligation evidently unjust, the court of law may order: a) the *adaptation* of the contract in order to equitably distribute between the parties the losses and benefits resulting from the change in circumstances; b) the *termination* of the contract at the moment and under the conditions established under it". These provisions are similar to those in Art. 6.2.3 of the Unidroit Principles 2010, which provides that In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach

agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable: a) terminate the contract at a date and on terms to be fixed; or b) adapt the contract with a view to restoring performance *equilibrium*.

4.1. Contract adaptation by the Court

Contract adaptation is the first solution put forward by the lawmaker. The straightforward purpose is to quantitatively change the parties' performances with a view to restoring contractual balance (Zamsa, 2006, 211).

Contractual balance restoration needs the application of a series of criteria, the most important of which being the contractual economy, as considered by the parties upon contract conclusion. At the same time, it is necessary for the Court to also take into consideration the manner in which the contract is executed over a predictable period of time, in terms of potential external influences. Contract adaptation may take the form of the adjustment of contractual provisions or of the amendment of the means of execution by a potential elimination of the effects of specific contractual provisions so as to restore a reasonable proportion of the parties' rights and obligations. Certainly, the courts of law is to take due consideration of an essential factor. It relates to the normal risk of the economic and professional activities, which even the lawmaker attributes to the debtor of the obligation impossible to execute. Subject to the limitations considered to be accepted by any party, this risk is to be deducted from the amended amount of the performance. In practice, the intervention of the courts of law may materialise in several ways: from the decrease or increase in the price for the concerned product or service through the quantitative change thereof, provided by one of the parties. Likewise, it may take due consideration to the obligation to make compensatory payments or the amendment of specific contractual provisions or the imposition of price indexing criteria, etc. In their attempt to adapt the contract, the courts of law are to take into consideration the initial balance thereof, by referring to the economic parameters agreed between the parties, and not an ideal balance of the concerned type of contract. As a result, the Court is to adapt the contract so that, in the absence of the particular unpredictable event, the execution is performed subject to the limitations initially provided and agreed between the parties (Boroi, 2001, 156). In terms of the possibility to also adapt potential documents accessory to the main contract, such as the guarantees, the doctrine expressed some reservations on the possibility for the courts of law to also intervene on this matter, because the new Civil Code makes reference only to the *adaptation of the contract*, not to the accessory contracts.

4.2. Contract termination

The second option available to the courts of law in the contract termination, on the deadline and under the conditions determined. This is the most radical effect of the event and, because of the consequences thereof, it consists in one of the arguments put forward by the adversaries of the theory of imprevision with a view to proving the need to dismiss it. Prior to the new Civil Code becoming effective, there is the need for the grounding of the decision for contract termination in case of an exceptional and unpredictable change in circumstances for the execution thereof. The means by which the disposal to terminate the contract were grounded in the doctrine on the assimilation of imprevision to the force majeure or fortuitous events, by applying the mechanism of a *sui generis* termination and, finally, by considering imprevision as a distinctive, independent cause for contractual obligation termination. Contract termination is the disposal to be upheld by the courts of law only to the extent the contract adaptation is not possible under the new circumstances, in terms of an equitable redistribution of losses and benefits. The doctrine (Pop, Popa, Vidu, 2012, 160) considers that this disposal is necessary when it would result in an unfair situation for at least one of the parties and the contract termination is necessary with a view to reducing the losses or causing a prejudice as low as possible, the purpose for which it was created therefore becoming useless or without social use or when such purpose cannot be reached by using all the other means of imprevision application. When analysing the lack of interest, as a basic condition for the contract, a distinction is to be made between the interest of the contract and the particular interest of each of the contracting parties. The interest of the contract covers the economic benefits related to the type of convention selected by the parties. It can be identified in the very structure of the contract and is assimilated to the economic purpose envisaged by the parties under the contract. It exceeds the mere counter performance, because it involves a pragmatic review of the economic benefits actually expected

following contract conclusion. As detailed in the doctrine, identifying the purpose of the contract involves the judge taking due regard to the interest of each of the contractual parties, by way of segregating the aim of the contractual operation and verifying its purpose as a whole, with a view to understanding and separating performances and counter performances required for achieving such. From this perspective, the interest of the contract may be considered to be the converging point of the parties' expectations, this opinion supplementing that which considers the parties' agreement to be more than an agreement of will (Tison, 1931, 15), being even an independent legal entity, a mix of elements which, beyond an overlapping of wills, includes a logical global aim of its own (Carbonnier, 1995, 312). In terms of compensation awarding for contract termination in the form of compensatory damages, it was deemed it was the disposal to be withheld by the courts of law because the prejudice is already caused to the other party by way of non-execution. The reasoning would be that a contrary situation would involve that the risk resulting from the change in circumstances (*Draft European Private Code*, 2000, Art. 6:111), is borne by the creditor, while the debtor is released from the obligations thereof.

It cannot be absolutely and universally about the fact that, when the damages are not awarded, the contract termination would result in the elimination of the loss for the debtor, while the loss suffered by the contracting partner is already caused. The loss suffered by the creditor following the non-execution of the difference by the debtor is to be analysed, on a case-by-case, basis such operation being mandatory for the courts of law when analysing contract termination conditions. One would rather suppose that the debtor's financial and economic strain results in an additional increase in the creditor's gain as compared to the initially estimated one, at least from the perspective of the market value of the performance owed by the debtor and which is in the patrimony of the contracting partner thereof. From such a perspective, the limitation of compensation awarding, if deemed to be fair and balancing the performances already completed, for the analysing of the values during performance execution and not upon contract conclusion, it can be certainly said that it should be less that the prejudice suffered by the contracting partner following non-execution, otherwise, the institution of imprevision lacking practical use. (Ghestin, Jamin, Billiau, 2001, 408-409) At the same time, when analysing each individual case, consideration is to be given also to a fair distribution of the contract risks, this involving even the creditor bearing the risk in full if it is a fair solution from an economic perspective, given the overall aim of the contract.

In terms of parties' restoration to the previous status thereof, this disposal cannot be envisaged, given that the nature of the review involves reconsidering the contract from the time the change in circumstances occurred, for the purposes of deciding on the future course of the contract. Likewise, consideration should be given to the fact that the discussion is about certain synallagmatic contracts with successive execution and the courts of law decision can have effects only for the future. In principle, it cannot a have retroactive effect on the contract, for the performances that were completed while contract execution to be maintained, on the condition that it should be impossible for the parties to be restored to the status thereof upon contract conclusion, with two mentions. On the one hand, the approach is not the same when a contract with execution at different times by the two contracting parties, is taken into consideration. When the debtor affected by the new circumstances undertook the responsibility to perform the obligation with precedence without receiving the counter performance, the contract may be terminated by restoring the parties to the previous status thereof. On the other hand, it should not be forgotten that this situation makes reference to the scope of equity, of contractual solidarity, which binds the courts of law to take the required measures with a view to avoiding the enrichment of one party on the expense of the other.

5. Conclusions

In conclusion, the contracting parties have available appropriate means and mechanism with a view to balancing the agreed-upon performances by inserting in the contract precautionary clauses, especially when it is a long-term contract, for this latter case, the probability for a disturbing event to occur being much higher. In case of imbalance, the parties have the possibility to appeal to extra contractual economic techniques, either internal or external, aimed at rebalancing the contractual performances, but they also have available other diversified legal means for restoring the balance, to the extent such can be attributable to one of them because of a guilty non-execution of the undertaken obligations. The contracts potentially affected by imprevision are, most often, complex. It is difficult to estimate whether the unpredictable event causes effects only in terms of a simple obligation undertaken by the debtor, and not

to the obligations as a whole. Consequently, contract adaptation, re-agreement of the financial and economic responsibilities, are to be analysed with a view to restoring the balance of the contract as a whole, namely, of all rights and obligations of the parties arising from contract conclusion, regardless whether they derive directly from the agreement or from the accessory documents thereof, from the law or from other sources. In regard to the configuration of the operative part of the decision to adapt the contract, it should contain enough details for the decision – as a remedy – not to imbalance the contractual report to an opposite direction. The references in such document are to be clear and accurate.

References

Beleiu, Gh. (2003). Theory of Imprevision - Rebus sic Stantibus, in *Civil Law II, Law Magazine*, Issue 10-11, pp. 32-33.

Josserand, L. (1933). Le contrat dirige, *Recueil hebdomadaire Dalloz*, Paris, 138.

Supiot, A. (2011). *Homo juridicus*, translation by Catalina Teodora Burga, Dorin Rat. Bucharest: Rosetti Educational, 138.

Djuvara, M. (1999). *General Law Theory. Rational Law, Sources and Positive Law*. Bucharest: All Beck, 228.

Deleanu, I. (2005). *Legal Fictions*. Bucharest: All Beck, 249.

Pop, L. (1994). *Civil Law Treaty. General Theory of Obligations*. Iaşi: Chemarea, 60.

Sitaru, D., Al. (1996). *International Commercial Law – Treaty*. Bucharest: Acatami, 1996, 77.

Pop, L., Popa, I.Fl., Vidu, S.I. (2012). *Civil Law Treaty. Obligations, vol. II. Contract*. Bucharest, Universul Juridic, 534.

Starck, B. (1972). *Droit civil. Les Obligations*. Paris: Librairies Technique, 565.

Geamănu, R., Gh. (2007). *Hardship Clause in the International Commercial Contracts*. Bucharest: Hamangiu, 23.

Motica, R., I., Lupan, E. (2008). *General theory of civil obligations*. Bucharest: Lumina Lex, 76.

Dumas, H., B. (2001). Les contrats relationnels et la théorie de l'imprévision*, Revue internationale de droit économique*, No.3 (t. XV, 3), 371 and following.

Zamşa, C., E. (2006). *Theory of Imprevision. Study on Doctrine and Jurisprudence.* Bucharest: Hamangiu, 211.

Boroi, G. (2001). *Civil Law Treaty. General Part. Persons*. Bucharest: All Beck, 156.

Pop, L., Popa, I., Fl., Vidu, S., I. (2012). *see above.*, 160.

Tison, R. (1931). *Le principe de l'autonomie de la volonte dans l'ancien droit francais*. Paris: Domat, Montchrestien, 15.

Carbonnier, J. (1995). *Flexible droit*, 8th edition. Paris: Librairie Générale de Droit et de Jurisprudence, 312.

Ghestin, J., Jamin, C., Billiau, M. (2001). *Traite de droit civil. Les effects du contract* 3e édition. Paris: Librairie Générale de Droit et de Jurisprudence, 408-409.